BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GERALYNN DUXBURY	)	
Claimant	)	
VS.	)	
	)	
SONIC DRIVE-IN OF K038	)	Docket Nos. 1,051,973
KANSAS CITY, KANSAS	)	& 1,051,974
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Claimant appeals Special Administrative Law Judge (SALJ) Gregory A. Lee's Award dated August 9, 2012. The Board heard oral argument on January 9, 2013.

APPEARANCES

Leah B. Burkhead, of Mission, Kansas, appeared for claimant. Brian J. Fowler, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

Claimant asserted two separately docketed cases involving injuries to her left leg, left hip and low back. Docket No. 1,051,793 concerns cumulative trauma culminating in an accident on May 17, 2010. Docket No. 1,051,794 alleges a specific accident on May 17, 2010. SALJ Lee denied compensation, finding claimant did not suffer personal injury by accident arising out of and in the course of her employment.

Claimant argues the Board should reverse SALJ Lee's decision and find she suffered personal injury by accident arising out of and in the course of her employment. Respondent maintains the Award should be affirmed.

The issues before the Board are:

(1) Did claimant suffer personal injury by accident on May 17, 2010 and/or from cumulative trauma culminating May 17, 2010 that arose out of and in the course of employment?

(2) Did claimant provide timely notice?

(3) What is the nature and extent of claimant's injuries?

(4) Is claimant entitled to temporary disability benefits, including:

(a) temporary total compensation from May 17, 2010 through July 17, 2010 and from September 28, 2010 through November 6, 2010; and

(b) temporary partial disability benefits from July 18, 2010 through August 16, 2010 and from November 7, 2010 through January 10, 2011?

(5) Is claimant entitled to payment of medical expenses, including:

(a) charges totaling $62,468.46 as outlined in Regular Hearing Exhibit 3;

(b) reimbursement for her out-of-pocket expenses including medical expense of $494.54, prescriptions of $62 and medical mileage of 737.6 miles or $368.80;

(c) up to $500 in unauthorized medical allowance for each claim; and

(d) future medical compensation?

FINDINGS OF FACT

Claimant works for respondent as an assistant manager and carhop. Her job entails getting the store ready to open and waiting on 60-80 customers. Claimant was working full-time, earning $7.75 an hour as assistant manager, and $6.55 an hour, plus tips, as a car hop. She also works full-time for the YMCA as a greeter, a job involving mostly sitting.

Claimant began experiencing pain in her left hip and low back for approximately three weeks prior to May 17, 2010. Claimant testified her condition was “very painful” and she “couldn’t walk right.”[1]

[1] R.H. Trans. at 29.

Claimant went to Dr. Katie Szewc-Vanwinkle, D.C., on May 10, 2010. Claimant complained of progressively worsening, constant hip and back pain that started about four days earlier with no specific injury. Claimant reported feeling "being jammed"[2] when walking or getting up. Pain interfered with her work, sleep, daily routine and recreation. Sitting would relieve her pain. Claimant reported running 7-10 miles per day.[3] She was concerned her shoes were wearing out. Dr. Szewc-Vanwinkle diagnosed low back pain with radiculopathy. Claimant was given slips on May 11 and May 12, 2010, excusing her from work until further notice. The May 12 off work slip noted claimant was unable to sit, stand and walk due to pain. Claimant stopped working at the YMCA because it paid sick pay, but kept working for respondent because she could not get sick pay from respondent. Claimant treated with Dr. Szewc-Vanwinkle every day from May 10 through May 13, 2010.

Claimant went to Heartland Urgent Care on Saturday, May 15, 2010, with complaints of back and left thigh pain for one week. She reported no specific injury, but advised she was a runner. She was prescribed a Medrol Dosepak, Vicodin and Flexeril.

Claimant testified that walking, pivoting and going up and down curbs while working for respondent worsened her symptoms. She testified her manager, Mike Kazmi, asked why she was walking differently; claimant responded, "I don't know."[4] Treatment records did not indicate claimant associated walking as a carhop as causing her injury.

Claimant was still experiencing low back pain radiating down her left leg when she got to work on Monday, May 17, 2010. That day, claimant, while walking briskly as a car hop, pivoted around a corner, felt severe pain and a pop in her left hip, and fell to the ground. Claimant did not slip or trip on any substance or stray material. She testified:

> Okay. I came in from delivering food and I pivoted around the corner to make a drink, and when I did, I felt something I've never felt before. So I went down, and when I went down I couldn't get back up, and I told [Mr. Kazmi], I said, "You need to call the ambulance because I don't know what happened."[5]

Mr. Kazmi witnessed the accident. He called an ambulance. Claimant was taken to Providence Medical Center, where Dr. Mark J. Maguire, M.D., a board certified orthopedic surgeon, performed an open reduction internal fixation to repair claimant's subtrochanteric hip fracture. Claimant remained hospitalized until May 27, 2010.

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[2] *Id.*, Resp. Ex. A at 2.

[3] *Id.* Claimant testified she was an avid runner for 20-25 years prior to May 17, 2010, and ran from 2-6 miles a day during the week, and up to 15 miles on Sundays. *Id.* at 34.

[4] *Id.* at 39; see also pp. 38-39.

[5] *Id.* at 16.

While in the hospital, claimant received a telephone call from Tonya Mckinzie, an insurance adjuster. Claimant did not recall details of the conversation, but Ms. Mckinzie wanted to discuss her accident. Subsequently, claimant received Ms. Mckinzie's May 28, 2010 letter acknowledging a worker's compensation claim.

Claimant remained off work from respondent from May 17, 2010 through July 17, 2010. Claimant was off work from the YMCA from May 17, 2010 through July 18, 2010.

During the course of claimant's treatment, Dr. Maguire noted claimant was not osteoporotic, but borderline, based on a bone density test. On June 25, 2010, Dr. Maguire recommended claimant work on her diet and take calcium and vitamin D supplements.

Unfortunately, the hardware surgically installed by Dr. Maguire broke. Dr. Maguire performed surgical repair on September 30, 2010. Claimant was off work from respondent from September 28, 2010 through January 10, 2011. Claimant returned to her job at the YMCA on November 6, 2010.

A November 8, 2010 report from Professional Rehabilitative Services, Inc., P.A., contained claimant's indication she began having hip and leg pain at the beginning of 2010 and her femur fractured while walking at work. The report contains claimant's statement that she likely had a stress fracture that was causing her pain prior to the full fracture.

Dr. Maguire released claimant at maximum medical improvement on March 9, 2011.

At claimant's attorney's request, she was evaluated by P. Brent Koprivica, M.D., on June 20, 2011. Dr. Koprivica opined claimant had a "work injury from her employment activities . . .,"[6] including extensive walking while working for respondent and having her left hip pop when walking around a corner on May 17, 2010, followed by pain that kept her from standing. Dr. Koprivica's June 20, 2011 report stated:

> Ms. Duxbury's work injury from her employment activities at Sonic Drive-In with the specific fracture that occurred on May 15 [sic], 2010, represents the direct and proximate cause for Ms. Duxbury's ongoing impairment of the left hip.[7]

Claimant told Dr. Koprivica that she had left hip discomfort and stiffness, but denied ongoing back pain. Dr. Koprivica rated claimant at a 15 percent whole person impairment based on the AMA *Guides*[8] for a subtrochanteric fracture of the left hip.

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[6] Koprivica depo., Cl. Ex. 2 at 8.

[7] *Id.*

[8] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Respondent's attorney asked Dr. Maguire to address causation. Dr. Maguire responded in a December 15, 2011 letter:

> I do not think her fracture is related to an injury that she sustained at work. There is no history of significant trauma. The fracture pattern, I think, would be more consistent with a stress fracture. Ms. Duxbury was an avid runner and I think it is more likely that she developed a stress fracture and that it finally gave way as she pivoted at work.[9]

Dr. Koprivica testified that claimant's left hip injury was due to her employment activities for respondent. He testified claimant's left hip fracture occurred from pivoting on May 17, 2010 because she would not have been able to walk or bear weight with a fractured hip prior to May 17, 2010. Dr. Koprivica testified claimant's hip fracture would not have occurred from pivoting forcefully absent "some insufficiency that predated it."[10] He testified that claimant's stress fracture existed before May 17, 2010. Dr. Koprivica testified claimant's back complaints made to the chiropractor and Heartland Urgent Care prior to May 17, 2010, actually concerned her left hip. Dr. Koprivica opined claimant's fracture could have occurred anywhere, so long as the motion and forces on the bone were the same. He acknowledged claimant's running 7 to 10 miles a day contributed to a femur stress fracture. He agreed claimant's running was more traumatic than just walking, if the case were viewed in terms of the prevailing factor that caused the injury.[11]

Dr. Maguire testified claimant's complaints to the chiropractor could have been consistent with a hip stress fracture. Dr. Maguire testified claimant had a stress fracture before May 17, 2010. He testified a stress fracture is an overuse injury to the bone due to multiple small traumas occurring over time. Dr. Maguire was asked about causation:

> Q. And the walking activities she does, would that have aggravated, any walking, turning, would that have aggravated a hip stress fracture at work or at home?
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> A. I would think, yeah, anything could have been the final straw at that point. So I think any kind of walking or twisting sort of I think could have caused the final fracture.[12]

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[9] Maguire Depo., Resp. Ex. B.

[10] Koprivica Depo. at 30.

[11] Dr. Koprivica was likely referring to legislative changes now requiring that an injured worker prove that an accident or injury by repetitive trauma was the prevailing factor in a claimant's injury, medical condition and resulting disability. The prevailing factor requirement does not apply to this case, only to accidents or injuries by repetitive trauma occurring on or after May 15, 2011. See *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 587-88, 257 P.3d 255, 259 (2011).

[12] Maguire depo. at 14-15.

. . .

Q. So had she not went to work that day, had she not pivoted sharply around a corner at a 90-degree angle, she would not have sustained a full fracture that day?

A. Well, if she would have pivoted at home she would have. If she would have gotten up out of a chair, I mean, it was waiting to happen.

Q. I understand your distinction, but it didn't happen at home, did it?

A. No. But it was a -- you're right. No, it didn't happen at home, but it was waiting to happen no matter what she would have done. The fracture would have occurred any way.[13]

Dr. Maguire agreed walking and pivoting is a normal every day activity that everyone performs. He testified any repetitive activity, including walking at home, getting out of bed or getting out of a chair, could contribute to a stress fracture.

Dr. Maguire testified claimant already had a nondisplaced fracture that was displaced and worsened from pivoting at work. When asked the difference between a stress fracture and a full fracture, Dr. Maguire testified, "Ultimately in her case it led to a full fracture. As opposed to one big trauma that caused a fracture it's multiple small traumas that weakened the bone to the point where it finally fractured."[14] He testified the "final straw" causing the stress fracture to become a full fracture was the pivoting at work.[15] He testified the degree of claimant's pivot "wouldn't matter"[16] and a normal bone would not break from pivoting. He agreed claimant's walking at work could have contributed to her stress fracture, but her extensive running was "more stressful" and the "bigger trauma."[17]

Claimant's medical expenses were denied under workers compensation and submitted under her husband's group health insurance carrier. Claimant incurred $62,468.46 in medical expenses related to her work injury. In addition, claimant has incurred out-of-pocket medical expenses of $494.54, out-of-pocket prescription expenses of $62, and medical mileage of 737.6 miles or $368.80.

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[13] *Id.* at 25.

[14] *Id.* at 17.

[15] *Id.* at 22-23.

[16] *Id.* at 22.

[17] *Id.* at 21.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[18]

K.S.A. 2009 Supp. 44-508(d) states in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

The phrases arising "out of" and "in the course of" employment have separate and distinct meanings. Each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[19]

K.S.A. 2009 Supp. 44–501(c) states in part that an employee "shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability."

The test is not whether the injury causes the condition, but whether an injury aggravates the condition.[20] Even if there is an aggravation of a preexisting condition, a claimant must prove "a relationship between the aggravation and accidental injury arising out of the employment. Causation remains an essential."[21]

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[18] K.S.A. 2009 Supp. 44-501(a).

[19] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[20] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 377, 573 P.2d 1036 (1978).

[21] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 738, 504 P.2d 625 (1972).

K.S.A. 2009 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The phrase "suffers disability . . . by the normal activities of day-to-day living" is subject to more than one interpretation:

> Under one interpretation, the injury is the result of day-to-day living – say, degeneration of a joint that occurs because of the ongoing strain that is placed on the joint both away from the job and on the job. Under the second interpretation, the injury is the result of the same *kind* of activity that may take place on the job as off the job – say, twisting the body to reach for an object. The syntax of the statute suggests that the former interpretation is correct, in that the wear of day-to-day living resembles the results of the natural aging process and is not like the stress of the worker's usual labor. Our courts have nevertheless at times followed an interpretation closer to the second way of reading the statutory language.[22]

Whether an injury arises out of employment depends on what claimant was doing when injured:

> [T]he proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury?"
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> . . .
>
> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement – bending, twisting, lifting, walking, or other body motions – but looks to the overall context of what the worker was doing – welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[23]

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[22] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 590, 257 P.3d 255, 259 (2011).

[23] *Id.* at 595-96.

Bryant held that reaching for a tool belt and bending to weld were not normal activities of day-to-day living.[24]

Boeckmann[25] concerned a claimant who had a degenerative hip condition for over a decade. He stooped to pick up a tire at work and became unable to work thereafter. Mr. Boeckmann's injury did not arise out of his employment. The evidence was:

> . . . his employment did not cause his condition to occur; that the hip condition had been a progressive process; . . . that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition.
> . . .
>
> "[E]veryday bodily motions required by claimant's work gradually and imperceptibly eroded the physical fibers of his structure, as the patient drip of water wears away the stone. The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off."[26]

"[I]njuries caused by or aggravated by the strain or physical exertion of work do not arise out of employment if the strain or physical exertion in question is a normal activity of day-to-day living."[27] Injuring a knee while turning in a chair and attempting to stand to reach for an overhead file is not compensable because it is a normal activity of day-to-day living.[28] The claimant in *Johnson* had a significant preexisting knee condition. Her treating doctor testified she "had years of degeneration and . . . it was just a matter of time" and there "wasn't anything particular about the swiveling in her chair that would be anymore likely to [injure claimant] than getting out of a car or getting out of bed or just standing up or anything else."[29]

Various appellate cases hold an injury generally does not arise out of employment if it was due to a risk to which the worker was equally exposed outside of employment:

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[24] *Id.* at 596.

[25] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[26] *Id.* at 738-39.

[27] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 790,147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[28] *Id.*

[29] *Id.* at 788.

- A traveling salesman was injured after someone threw a chunk of mud at the windshield of his car while he was working. His injury might have been sustained while traveling outside of work, just as well as while he working. His employment did not invite the attack. The case was not compensable.[30]

- Even where an injury occurs at work, it is not compensable unless it is "fairly traceable to the employment," as contrasted with hazards to which a worker "would have been equally exposed apart from the employment."[31]

- A claimant with prior back problems who sustained a specific injury on the employer's premises when twisting to get out of truck did not sustain a compensable injury because his injury was due to a personal risk: "Considering the history of claimant's back problems, it is obvious that almost any everyday activity would have a tendency to aggravate his condition, i.e., bending over to tie his shoes, getting up to adjust the television, or exiting from his own truck while on a vacation trip."[32]

- An injury from sitting, bending, or twisting was not compensable. Such movements were normal activities of day-to-day living.[33]

- An injury was not compensable where claimant fell and broke his femur after feeling pain in his leg while walking to pick up an order for a customer. There was no proof claimant was required to walk at work, either to a greater degree or dissimilar manner, than he would in his personal life.[34]

Work activities that "merely ignited pain symptoms that were inevitable" and would have occurred regardless of work, do not result in compensable injuries.[35] When a preexisting condition would progress regardless of work, the injury does not arise out of employment:

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[30] *Covert v. John Morrell & Co.*, 138 Kan. 592, 593, 27 P.2d 553, 554 (1933).

[31] *Siebert v. Hoch*, 199 Kan. 299, Syl. ¶ 5, 428 P.2d 825 (1967).

[32] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 300, 615 P.2d 168 (1980).

[33] *Brazil v. Bank One Corp.*, No. 100,989, 209 P.3d 765 (Kansas Court of Appeals unpublished opinion filed Jun. 26, 2009), *rev. denied* 290 Kan. 1092 (2010).

[34] *Meyer v. Nebraska Furniture Mart*, No. 107,424, 286 P.3d 576 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012).

[35] *Huggins v. Haysville Healthcare Ctr.*, No. 107,407, 287 P.3d 299 (Kansas Court of Appeals unpublished opinion filed Oct. 26, 2012), *petition for rev. filed* Nov. 21, 2012.

> Workers compensation should be reserved for persons who are injured on the job due to hazards specifically associated with that particular work, not for persons who come to an employer with a preexisting disease and suffer the inevitable consequences of that disease while they happen to be at work.[36]

In *Martin*,[37] claimant alleged a hip injury from getting under cars, bending, twisting, turning, squatting and stooping at work. Medical testimony established he had avascular necrosis that would deteriorate regardless of his activities, whether at work or when doing day-to-day activities. Mr. Martin did not suffer an injury that arose out of his employment.

Injuries occurring due to an increased employment risk generally result in compensability. For instance, work on a rooftop made claimant a more accessible target for a sniper.[38] Constantly entering and exiting vehicles was an increased employment risk that a claimant was not equally exposed to away from work.[39] Captive standing for prolonged periods at work was not a normal everyday activity.[40]

Various Appeals Board cases have found injuries from walking and/or turning to be compensable, despite argument that such activities were activities of day-to-day living. Such compensable injuries include: turning abruptly while walking fast around a corner,[41] significant work-related walking,[42] tripping while walking fast while performing work[43] and hurriedly turning to speak to a customer.[44] However, none of these cases contained evidence of significant preexisting conditions or personal risks.

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[36] *Martin v. CNH America LLC*, 40 Kan. App. 2d 342, 195 P.3d 771 (2007), *rev. denied* 286 Kan. 1178 (2008).

[37] *Id.*

[38] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 261-62, 597 P.2d 641 (1979).

[39] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 11, 61 P.3d 81 (2002).

[40] *Poff v. IBP, Inc.*, 33 Kan. App. 2d 700, 710, 106 P.3d 1152 (2005).

[41] *Smith v. Pittsburg State Univ.*, Nos. 258,509 & 258,510, 2003 WL 22150493 (Kan.WCAB Aug. 12, 2003).

[42] *Higgins v. United Parcel Service, Inc.*, No. 1,032,172, 2007 WL 1390714 (Kan. WCAB Apr. 27, 2007); *Brace v. Sportsmans Warehouse*, No. 1,031,584, 2007 WL 2022162 (Kan. WCAB June 26, 2007).

[43] *Cook-Shelton v. Honeywell International*, No. 1,036,101, 2008 WL 651684 (Kan. WCAB Feb. 12, 2008).

[44] *Amack v. J.C. Penney Company, Inc.*, No. 1,039,340, 2008 WL 3280332 (Kan. WCAB July 14, 2008).

ANALYSIS

The statutory definition of "injury" excludes disabilities that are the result of the natural aging process or the "normal activities of day-to-day living." The statute essentially excludes personal risks from coverage under the Kansas Workers Compensation Act.

Claimant developed a stress fracture over time, as described by Dr. Maguire. Her stress fracture became a complete fracture at work on May 17, 2010. While claimant's injury fully manifested itself while she was at work, an injury occurring at work does not end the discussion on compensability. If being at work is the standard for compensability, the injuries in *Boeckmann*, both *Martin* cases and *Johnson* would be compensable. Such cases have not been overruled.

Claimant's walking and pivoting as a carhop, whether done at a fast pace or otherwise, did not expose her to a greater hazard or risk than to what she would otherwise have been exposed in her normal day-to-day living, which included extensive running. Dr. Maguire testified that it would not matter to what degree claimant pivoted. He testified claimant's fracture was inevitable, which mirrors the testimony of the treating doctor in *Johnson*. The act of walking and pivoting is innocuous as compared to the running claimant performed outside of work. Walking quickly and pivoting is not a particular strain or episode of physical exertion. People perform such mundane activity everyday and everywhere. It is difficult for the Appeals Board to conclude claimant faced a greater risk from walking and pivoting at work, even if done so briskly or at a fast pace, as compared to her running 2-6 or 7-10 miles every day, plus 15 miles on Sundays, over the course of 20-25 years. Claimant's fast walking at work is not peculiar to her job, given her long-term and fast-paced running away from work.

The medical evidence was that claimant already had a stress fracture when she presented to work on May 17, 2010. While claimant worked for respondent that day, her treating chiropractor had already precluded her from working based on her inability to sit, stand and walk due to pain. Based on such restrictions, claimant opted to not work her mainly sedentary job at the YMCA. The mere happenstance that claimant's complete fracture occurred at work due to the routine act of walking does not change a non-compensable activity of daily living into a compensable work event.

A common theme running through *Boeckmann*, *Johnson* and the two *Martin* cases is that when virtually any activity would aggravate a claimant's underlying condition, to the degree that movements away from work were no different than movements at work, an injury at work does not arise out of employment. Claimant's injury is analogous to such cases. Claimant's fracture was going to happen regardless of her work. Dr. Maguire testified any kind of walking or twisting would have caused the end result; claimant's "fracture would have occurred any way" and was "waiting to happen no matter what she would have done." Claimant's mere workplace presence when the inevitable occurred does not make her injury arise out of her employment.

This case is not analogous to *Bryant*, as argued by the dissent. Both cases involve workers with preexisting conditions, but that is where the similarities end. Mr. Bryant's reaching for a tool belt and bending to weld were held not to be normal activities of day-to-day living. Here, claimant's quick walking cannot be said to be appreciably different than her daily running activity. Unlike the case at bar, *Bryant* did not involve expert medical testimony that any of his activities, at work or not, would cause his condition to worsen.

Other cases cited by the dissent, *Baxter*[45] and *Poehlman*,[46] are not relevant to the application of K.S.A. 44-508(e). Both cases were decided prior to the legislature enacting the statute in 1993. It was not argued in those cases that any movements of the respective claimants, on or off the job, would worsen their conditions. Neither case involved situations where medical evidence established that off-the-job movements were just as deleterious as on-the-job movements. Neither case involved a distinction between personal risks and employment risks. Similarly, while the dissent views the Appeals Board cases of *Smith*, *Higgins*, *Brace*, *Cook-Shelton* and *Amack* as on-point in favor of compensability, these cases were devoid of proof of preexisting conditions that would have worsened no matter what the workers would do at work or away from work.

The Appeals Board concludes claimant's injury resulted from day-to-day activities and claimant's personal risk, i.e., her already fractured femur. Claimant did not prove either a series of accidental injuries through May 17, 2010 or a compensable injury occurring on May 17, 2010.

CONCLUSION

Claimant's accidental injury did not arise out of her employment with respondent. Her injury is directly attributable to activities of day-to-day living and her personal condition. As a result, all other issues raised on appeal are moot.

AWARD

WHEREFORE, it the Appeals Board affirms Special Administrative Law Judge Lee's Award dated August 9, 2012.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

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[45] *Baxter v L.T. Walls Constr. Co.*, 241 Kan. 599, 738 P.2d 445 (1987).

[46] *Poelman v Leydig*, 194 Kan. 649, 400 P.2d 724 (1965).

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DISSENTING OPINION

The undersigned Board Member would reverse the Award and find claimant sustained a compensable aggravation of a preexisting condition. There is no significant distinction between the facts of this case and those in *Bryant*,[47] as discussed in detail below. The preponderance of the evidence supports the conclusion that claimant's accidental injury arose out of her employment with respondent.

In *Bryant*, the Kansas Court of Appeals considered the claim on appeal from the Board and issued an unpublished opinion.[48] The Court of Appeals noted Mr. Bryant, who claimed low back injuries on March 2, 2003 and May 13, 2003, had a serious prior low back injury that occurred in August 1997 when he fell through a wooden boat dock. The 1997 injury required extensive conservative treatment, epidural steroid injections and surgical treatment consisting of a laminectomy and discectomy at the L4-5 level of claimant's spine. Surgery did not relieve Mr. Bryant's back pain and additional treatment was required, including 87 chiropractic treatments between July 2000 and February 2003. The chiropractic treatments included seven such sessions in February 2003.

On March 2, 2003, Mr. Bryant was reaching for a tool bag at work when he felt a "pop" or "snap" in his back followed by a severe increase in lower back pain. Mr. Bryant was only able to return to light-duty work and he required a helper. Mr. Bryant again felt an increase in low back pain on May 13, 2003 when he stooped and leaned over to weld.

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[47] *Bryant v. Midwest Staff Solutions, Inc.,* 292 Kan. 585, 257 P.3d 255 (2011).

[48] *Bryant v. Midwest Staff Solutions, Inc.,* No. 99,913, 203 P.3d 89 (Kansas Court of Appeals unpublished opinion filed March 13, 2009) *rev'd sub nom. Bryant v. Midwest Staff Solutions, Inc.,* 292 Kan. 585, 257 P.3d 255 (2011).

A court-ordered physician, Vito Carabetta, M.D., opined Mr. Bryant's March 2 and May 13, 2003 incidents were instigating events that pushed him "over the limit." Mr. Bryant had a lumbar fusion on September 23, 2003.[49]

Theodore Sandow, Jr., M.D., noted essentially no change in the physical structure of Mr. Bryant's lower back, based on his comparison of MRI scans performed before and after the claimed injuries in 2003. However, Dr. Sandow testified the two events at work in 2003 aggravated and changed claimant's relatively stable back condition.

The Kansas Court of Appeals observed that neither party presented evidence that Mr. Bryant's injury was the result of normal activities of day-to-day living, but commented that his actions of bending and reaching were arguably just activities of normal day-to-day living, as was standing up in *Johnson*[50] and stooping in *Boeckmann*.[51] The Court held a work injury is not compensable unless it is fairly traceable to the employment. The Court reiterated the holdings of both *Martin*[52] cases – essentially that workers compensation benefits are reserved for injuries caused by employment risks, but not for workers with preexisting conditions that would likely worsen due to activities of day-to-day living. The Court of Appeals found no evidence that Mr. Bryant's job contributed to his injury nor any evidence of a work-related hazard. The Court found Mr. Bryant did not suffer an injury because his acts of stooping and leaning were normal activities of daily living and the only factor that caused his injury was his "already highly unstable lower back."

Bryant was appealed to the Kansas Supreme Court. The Supreme Court noted that mere aggravations or accelerations of a preexisting conditions are compensable accidental injuries. The Court noted that various and seemingly conflicting precedent failed to establish a constant principle or bright-line test to distinguish between work activities that result in a compensable aggravation of a preexisting condition and injuries caused by non-compensable activities of day-to-day living. The Supreme Court concluded the focus should be on whether the activity that results in injury is connected to, or inherent in, the performance of the job. The Court held Mr. Bryant was not engaged in normal activities of day-to-day living when he reached for his tool belt and when he stooped down and tried to lean to carry out welding, both of which were work-related activities and therefore compensable.

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[49] Of note, a spine surgeon advised Mr. Bryant to consider a lumbar fusion in 2000. *Bryant v. Midwest Staff Solutions, Inc.*, No. 1,010,656, 2007 WL 4661986 (Kan.WCAB Dec. 31, 2007).

[50] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 790,147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[51] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 738-39, 504 P.2d 625 (1972).

[52] *Martin v. U.S.D No. 233*, 5 Kan. App. 2d 298, 300, 615 P.2d 168 (1980); *Martin v. CNH America LLC*, 40 Kan. App. 2d 342, 195 P.3d 771 (2007), *rev. denied* 286 Kan. 1178 (2008).

In this claim, the activity that caused an aggravation of claimant's preexisting condition was her brisk walking and pivoting while engaged in completing a customer's order. Delivering and completing customer orders were inherent in claimant's employment as a car hop. The majority opinion seems to focus on the specific movements of walking and turning. In doing so the majority engages in precisely what the Supreme Court held in *Bryant* was not the proper analysis. *Bryant* instructs:

> We cannot discern a consistent principle in these various opinions. Certainly, no bright-line rule emerges from analysis of these cases or from the plain language of the statute. To be sure, twisting or bending over are daily activities, for workers as well as nonworkers. So are lifting objects, cutting pieces of meat, typing on keyboards, and walking and standing for extended periods of time. The Court of Appeals' opinion in the present case tends to remove from the purview of workers compensation protection the many work-related ailments that follow from activities that may also be carried out away from the job.
>
> Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? . . . [T]he test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment." 1 Larson's Workers' Compensation Law § 1.03[1] (2011).
>
> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [*sic*] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement—bending, twisting, lifting, walking, or other body motions—but looks to the overall context of what the worker was doing—welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.

Contrary to the conclusion of the majority of the Board, the evidence supports the conclusion that claimant's activities of brisk walking and pivoting on her left lower extremity while completing a customer's order exposed claimant to a greater risk of injury than she would otherwise be exposed in normal activities of daily living.

Claimant worked on a full-time basis for a Sonic restaurant, which no party disputes is a fast food establishment. Claimant was engaged in the mandates of her duties as a carhop when her accidental injury occurred. Obviously her job required that she deliver orders to the customers' vehicles in a prompt fashion. It seems exceedingly unlikely that claimant was free to "take her time" in performing those duties. On the contrary, the evidence supports the finding that claimant was required to wait on 60 to 80 customers per shift. Respondent does not dispute claimant's job required her to act in a prompt manner

in delivering orders, nor does it dispute that turning was necessary to the performance of the job. Claimant testified she was injured while moving in a brisk manner and pivoting around a corner. According to Dr. Koprivica, claimant's actions caused the left hip to internally rotate, causing a popping sensation and severe pain in her left hip. Claimant was getting a drink for a customer when the accident occurred. In doing so, she was unquestionably engaged in activity which resulted in some financial gain to respondent.

The majority labels claimant's work activities when she was injured as "innocuous" and "mundane" and concludes her injury would have occurred anyway, regardless of her work activity. In arriving at that finding, the majority emphasizes claimant's history of running. However, the evidence establishes claimant did not sustain a complete fracture of her left femoral neck while running or while engaging in other non-work related activities. The testimony of both Dr. Maguire and Dr. Koprivica support the finding that claimant's complete femoral fracture was caused by her job duties on the date of accident. To be sure, claimant likely sustained a stress fracture due to running before the accident took place, however, that preexisting condition was aggravated by claimant's actions at work.

Under the law in effect when this accident occurred, the risk of employing a worker with a preexisting disability was upon the employer, and when a worker who was not in sound health was accepted for employment and a subsequent work accident aggravates or accelerates the condition resulting in disability, he is entitled to be compensated for the resultant disability.[53] The testimony of claimant and both medical witnesses supports the conclusion that claimant's preexisting stress fracture was aggravated and accelerated by her May 17, 2010 work injury, resulting in a complete fracture. Claimant was able to walk and work for respondent until the complete fracture occurred.

The majority find the facts of this claim are analogous to those in *Boeckmann*, *Martin* and *Johnson*.[54] However, whether an accident arises out of the worker's employment depends upon the facts peculiar to the particular case.[55] Further, as noted in *Anderson*,[56] although Mr. Anderson's back problems could be aggravated by everyday activities, that fact alone is not controlling. If a claimant's injury results from the concurrence of a preexisting non work-related condition and a hazard of employment, compensation is generally allowed. In this claim, the quick movement and turning required by claimant's job for respondent caused the complete femoral fracture.

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[53] *Baxter v L.T. Walls Constr. Co.*, 241 Kan. 599, 738 P.2d 445 (1987); Poelman v Leydig, 194 Kan. 649, 400 P.2d 724 (1965); K.S.A. 44-501(c).

[54] The citations to these cases are set forth in footnotes 21, 27, and 32.

[55] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[56] *Anderson v. Scarlett Interiors*, 31 Kan. App. 2d 5, 11, 61 P.3d 81 (2002)

The majority of my colleagues rely on K.S.A. 44-508(e) in concluding claimant's injury did not arise out of her employment, however, that subsection of the Act expressly concerns when an injury is "directly caused" by the employment. It accordingly has little or no applicability to this claim because direct causation is not required to prove a compensable injury, only an aggravation or acceleration. The Act must be applied as written:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[57]

The holding of the majority in this claim is an unfortunate departure from previous Board decisions. As the majority recognizes:

> Various Appeals Board cases have found injuries from walking and/or turning to be compensable, despite argument that such activities were simply activities of day-to-day living. Such compensable injuries include: turning abruptly while walking fast around a corner, significant work-related walking, tripping while walking fast while performing work and hurriedly turning to speak to a customer.[58]

For the foregoing reasons, this Board Member would reverse SALJ Lee's Award and remand the claim for further findings of fact and conclusions of law.

_____
BOARD MEMBER

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Honorable Gregory A. Lee, Special Administrative Law Judge

[57] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676, 678 (2009).

[58] The names and citations for these claims are set forth in footnotes 41-44.